

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
-vs-)	Case No. CR-04-114-F
)	
MELVIN ELLIS HOLLY,)	
)	
Defendant.)	

ORDER

Before the court is defendant's Motion for Leave to File "Notice of Appeal" Out of Time, filed December 27, 2010 (doc. no. 139). In his motion, defendant requests leave to file a notice of appeal as to the court's order of August 24, 2010 (doc. no. 122), denying defendant's Motion for a New Trial and Motion for Requesting Appointment of Counsel Pursuant to Rule 28 U.S.C. § 1915(e)(1), and the court's order of October 7, 2010 (doc. no. 129), denying defendant's motion seeking relief under Rule 60(b)(3). The court construes defendant's motion as one seeking an extension of time to file a notice of appeal pursuant to Rule 4(b)(4), Fed. R. App. P.¹

Rule 4(b)(4) provides:

Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

¹ Rule 4(b), Fed. R. App. P., applies to and governs the filing of notices of appeal in criminal cases.

Rule 4(b)(4), Fed. R. App. P. The time prescribed by Rule 4(b)(1), Fed. R. App. P., for filing a notice of appeal is 14 days from the entry of the order being appealed. Thus, under Rule 4(b)(4), the time limit for filing a notice of appeal in a criminal case may be extended by the district court but only up to 44 days from the date of the entry of the order being appealed. Defendant's motion for extension of time has not been filed within 44 days from entry of the August 24, 2010 order or 44 days from entry of the October 7, 2010 order. Although defendant states that he did not receive a copy of the orders from the court clerk, the court finds that even if such statement were true, it does not change the impact of Rule 4(b)(4). In criminal cases, notice to the parties of the entry of court orders is governed by Rule 49, Fed. R. Crim. P. The second sentence of Rule 49(c) provides:

Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.

Rule 49(c), Fed. R. Crim. P. The effect of this sentence is to preclude the court from granting an extension of the time because of a lack of notice beyond the thirty day period allowed by Rule 4(b)(4), Fed. R. App. P. 3B Charles Alan Wright, Nancy J. King, Susan R. Klein, & Peter J. Henning, Federal Practice and Procedure, § 823 (3d ed. 2010). Because defendant did not file a motion for extension of time within the thirty day period allowed by Rule 4(b)(4), the court concludes that defendant's motion should be denied. *See, U.S. v. Trotter*, Case Nos. 09-3162, 09-3218, 09-3163, 09-3219, 379 Fed. Appx. 735, 2010 WL 2017710 (10th Cir. May 21, 2010) (district court did not abuse discretion in denying defendants' motion to extend time for filing notices of appeal; the language of Fed. R. App. P. 4(b)(4) makes clear that the district

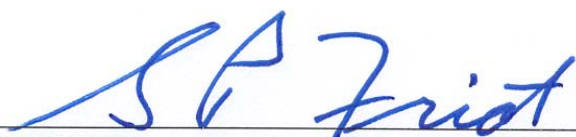
court could only extend the time for filing a notice of appeal for thirty days beyond Rule 4(b)(1)'s deadline).²

In his motion, defendant also requests the court to send him a copy of all three motions that were denied by the court. In light of the court's ruling, the court finds no justification for sending defendant a copy of defendant's motions. Although not specifically requested by defendant, the court shall direct the court clerk's office to again send defendant a copy of the August 24th and October 7th orders, which defendant states that he did not receive.

Accordingly, defendant's Motion for Leave to File "Notice of Appeal" Out of Time, filed December 27, 2010 (doc. no. 139), which the court construes as one seeking an extension of time to file a notice of appeal pursuant to Rule 4(b)(4), Fed. R. App. P, is **DENIED**.

The court clerk is directed to send with this order a copy of the court's order of August 24, 2010 (doc. no. 122), denying defendant's Motion for a New Trial and Motion for Requesting Appointment of Counsel Pursuant to Rule 28 U.S.C. § 1915(e)(1), and the court's order of October 7, 2010 (doc. no. 129), denying defendant's motion seeking relief under Rule 60(b)(3).

Entered this 6th day of January, 2011.


STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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² Unpublished decision cited for persuasive value pursuant to 10th Cir. R. 32.1(A).